Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-459 OF 1995, W-02-460 OF 1995, W-02-398 OF 1995, W-02-461 OF 1995 AND W-02-397 OF 1995

GOPAL SRI RAM, NH CHAN AND ABDUL MALEK AHMAD JJCA

7 NOVEMBER 1997

Civil Procedure *— Judgment — Conflicting judgments of the same court on the same subject matter between the same parties — Subsequent judgment in contrast to findings in earlier decision — Whether reasons set out in earlier decision amount to judgment — Whether subsequent judgment a nullity*

Tort *— Negligence — Professional negligence — Medical practitioner — Failure of defendant to alert plaintiff's parents of possibility of loss of vision (RLF) at time of discharge — No measure, preventive or curative for RLF at that time — Whether it would have made any difference if defendant had alerted the parents since there was no treatment available at the material time*

Tort *— Negligence — Professional negligence — Medical practitioner — Standard of care — Whether a doctor has been proved to be guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of*

The respondent ('the plaintiff') had claimed, inter alia, against the second and third appellants ('the defendants') — being the medical consultant and the hospital respectively — damages for negligence which had resulted in his blindness. It was alleged, inter alia, that excessive oxygen was given to the plaintiff when he was born prematurely in December 1975 and that the plaintiff's parents were not informed at the time of discharge (January 1976) of the possibility of the loss of vision ('RLF'). The trial judge awarded general damages of RM100,000 to the plaintiff. The defendants appealed. The grounds of appeal were, inter alia, that: (i) there were two conflicting judgments — the first judgment was pronounced in open court and described as a decision in which the trial judge had negated excessive oxygen as the cause, but blamed the defendant for the failure to alert. The second judgment was issued following the grant of leave. The defendant contended that there were contrary findings of fact and the second judgment could not stand in the light of the first judgment; (ii) there was no measure, preventive or curative for RLF at that time — the defendant contended that even if the parents had been alerted, there was nothing the parents could have done because all the medical witnesses had testified that in 1976, there were no measures to be taken for the prevention or treatment of RLF; and (iii) the trial judge erred in deciding what was the appropriate standard of care.

Held, allowing the appeal:

(1) Although the trial judge had dealt with the same issues differently in her two judgments, the court was more inclined to hold that her second judgment was a nullity. Based on authorities, only

the first judgment could be considered especially since the court had no inkling as to why there were two separate judgments eight months apart and because the contents of the second judgment were not exactly an elaboration of the first judgment resulting in the fact that they actually did not tally in substance. Although there appeared to be some form of explanation by the trial judge that her first judgment was not the 'grounds of judgment' but only a 'decision', as she had gone into some detail, the court could not hold that the reasons set out in the first judgment did not amount to a judgment. In any case, the first judgment, just like the subsequent decision, appeared in the notes of evidence as part of the record (see pp 67I, 68A–I and 69A–E); *In the matter of the trusts of the will of Tan Lye deceased, Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 113, *Habee Bur Rahman v PP* [1971] 2 MLJ 194 and *Ankur Nath Ganguli v PP* [1956] MLJ 206 followed; and *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 distinguished.

(2) The trial judge had categorically stated that the defendant was only negligent in not alerting the plaintiff's parents at the time of discharge of the possible onset of RLF. In this respect, the defendant had categorically stated in his report that it was his practice to advise routine ophthalmic examination for premature babies at the follow-up stage and upon a balance of probabilities, the court did not think the second defendant had not done so in the present case.

The court was bound by the case authorities in dealing with the question of the availability of the preventive and curative treatment of RLF as the situation was in late 1975 and early 1976 and not when the trial concluded on 26 January 1994 and the decision made on 27 January 1995, or when the court decided on this appeal on 1 April 1997. At that point of time, the medical literature referred and the evidence of the medical witnesses who testified clearly indicate that no such treatment was available and the court found that even if the second defendant had alerted the plaintiff's parents at the time of the plaintiff's discharge, which the court held he did as stated in his report, it would have come to nothing (see pp 69G–I and 74E–G).

(3) To succeed in an action based on negligence, whether against a doctor or against anyone else, it is necessary to establish a breach of that duty to take care which the law requires, and the degree of want of care which constitutes negligence must vary with the circumstances. Where the conduct of a doctor is concerned, the circumstances are not so precise and clear cut as in the normal case. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of. A doctor cannot be held

negligent if he follows what is the general and approved practice in the situation with which he is faced. The standard of care expected of a medical practitioner is that he is not required to exercise the highest or very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients. On these considerations, the claim against the second and third defendants must fail (see pp 76E–I and 77A–D); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, *Hunter v Hanley* [1955] SC 200, *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152 and *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171 followed.

[**Bahasa Malaysia summary**

Penentang ('plaintif') telah menuntut, antara lain, terhadap perayu-perayu kedua dan ketiga ('defendan-defendan') — iaitu perunding perubatan dan hospital masing-masing — ganti rugi untuk kecuaian yang telah mengakibatkan kebutaannya. Ia dikatakan, antara lain, bahawa oksigen berlebihan telah diberikan kepada plaintif apabila dia dilahirkan pramasa dalam bulan Disember 1975 dan bahawa ibu bapa plaintif tidak diberitahu pada masa dibenarkan keluar (Januari 1976) tentang kemungkinan kehilangan penglihatan ('RLF'). Hakim perbicaraan mengawardkan ganti rugi am sebanyak RM100,000 kepada plaintif. Defendan-defendan merayu. Alasan-alasan rayuan adalah, antara lain: (i) terdapat dua penghakiman yang bercanggah — penghakiman yang pertama diumumkan di mahkamah terbuka dan disifatkan sebagai suatu keputusan dalam mana hakim perbicaraan telah menyangkal oksigen berlebihan sebagai puncanya, tetapi menyalahkan defendan untuk kegagalan memberi amaran. Penghakiman kedua dikeluarkan berikutan pemberian kebenaran. Defendan menghujahkan bahawa terdapat pendapat fakta yang bertentangan dan penghakiman kedua tidak boleh dibiarkan memandangkan penghakiman pertama; (ii) tiada langkah, sama ada untuk mencegah atau merawat RLF pada masa itu — defendan menghujahkan bahawa sekalipun ibu bapa telah diberitahu, tiada apa-apa yang dapat dilakukan oleh ibu bapa kerana semua saksi perubatan telah memberi keterangan bahawa dalam tahun 1976, tiada langkah-langkah untuk diambil bagi mencegah atau merawat RLF; dan (iii) hakim perbicaraan terkhilaf dalam memutuskan darjah berjaga-jaga yang wajar.

Diputuskan, membenarkan rayuan:

(1) Walaupun hakim perbicaraan telah membincangkan isu yang sama secara berlainan dalam dua penghakiman beliau, mahkamah lebih cenderung memutuskan bahawa penghakiman kedua beliau adalah suatu pembatalan. Berdasarkan autoriti-autoriti, cuma penghakiman pertama boleh dipertimbangkan terutamanya kerana mahkamah tidak tahu mengapa terdapat dua penghakiman berasingan selang lapan bulan dan kerana kandungan

penghakiman kedua bukannya penghuraian lebih lanjut atas penghakiman pertama menyebabkan fakta bahawa mereka sebenarnya tidak selaras dari segi isi. Walaupun terdapat penjelasan oleh hakim perbicaraan bahawa penghakiman pertama beliau bukanlah 'alasan penghakiman' tetapi cuma suatu 'keputusan', kerana beliau telah menghuraikan secara terperinci, mahkamah tidak dapat memutuskan bahawa alasan-alasan yang dinyatakan dalam penghakiman pertama bukanlah suatu penghakiman. Walau bagaimanapun, seperti keputusan berikutnya, penghakiman pertama telah muncul dalam nota keterangan sebagai sebahagian rekod (lihat ms 67I, 68A–I dan 69A–E); *In the matter of the trusts of the will of Tan Lye deceased, Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 113, *Habee Bur Rahman v PP* [1971] 2 MLJ 194 dan *Ankur Nath Ganguli v PP* [1956] MLJ 206 diikut; dan *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 dibeza.

(2) Hakim perbicaraan telah menyatakan secara mutlak bahawa defendan hanya cuai dalam tidak memberitahu ibu bapa plaintif pada masa dibenarkan keluar tentang kemungkinan berlakunya RLF. Berkenaan ini, defendan telah menyatakan secara mutlak dalam laporannya bahawa adalah merupakan amalan beliau untuk menasihati pemeriksaan oftalmik yang rutin untuk bayi-bayi pramasa di tahap susulan dan pada imbangan kebarangkalian, mahkamah tidak fikir bahawa defendan kedua tidak berbuat demikian dalam kes ini.

Mahkamah adalah terikat oleh keputusan autoriti kes dalam menguruskan soal tentang terdapatnya rawatan pencegahan dan perubatan RLF atau tidak kerana keadaan berlaku pada lewat tahun 1975 dan awal tahun 1976 dan bukan apabila perbicaraan tamat pada 26 Januari 1994 dan keputusan yang dibuat pada 27 Januari 1995, atau apabila mahkamah memutuskan rayuan ini pada 1 April 1997. Pada masa itu, risalah perubatan yang dirujuk dan keterangan saksi-saksi perubatan yang memberi keterangan jelas menunjukkan bahawa tiada rawatan demikian boleh didapati dan mahkamah mendapati bahawa sekalipun defendan kedua telah memberitahu ibu bapa semasa plaintif dibenarkan keluar, yang mana telah diputuskan oleh mahkamah telah dilakukan seperti yang dinyatakan dalam laporan beliau, tiada apa-apa akan terhasil daripadanya (lihat ms 69G–I dan 74E–G).

(3) Untuk berjaya dalam suatu tindakan berdasarkan kecuaian, sama ada terhadap seorang doktor atau terhadap sesiapa yang lain, adalah perlu untuk membuktikan kemungkiran kewajipan berjaga-jaga yang dikehendaki oleh undang-undang, dan darjah ketiadaan sikap berjaga-jaga yang membentuk kecuaian mestilah berubah dengan keadaan-keadaan. Di mana kelakuan seorang doktor adalah berkaitan, keadaan-keadaan bukanlah begitu tepat dan jelas seperti dalam kes yang biasa. Ujian sebenar untuk

membukti kan kecuaian dalam diagnosis atau rawatan pada pihak seorang doktor adalah sama ada dia telah dibuktikan bersalah atas kegagalan demikian walhal tiada doktor yang berkemahiran biasa yang bersikap berjaga-jaga akan didapati bersalah. Seseorang doktor tidak boleh dipersalahkan cuai sekiranya beliau mengikut amalan yang biasa dan diluluskan dalam keadaan yang dihadapinya. Darjah berjaga-jaga yang dijangka daripada seorang pengamal perubatan adalah bahawa dia tidak dikehendaki melaksanakan darjah yang tertinggi atau yang amat tinggi tetapi cuma darjah berjaga-jaga dan kemahiran yang adil dan munasabah dalam rawatan pesakit-pesakitnya. Atas pertimbangan-pertimbangan ini, tuntutan terhadap defendan kedua dan ketiga mestilah gagal (lihat ms 76E–I dan 77A–D); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, *Hunter v Hanley* [1955] SC 200, *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152 dan *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171 diikut.]

[*Editorial Note*: The plaintiff has applied for leave to appeal to the Federal Court.]

Notes

For cases on judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1824–2030.

For cases on professional negligence of a medical practitioner, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 580–590.

Cases referred to

Ankur Nath Ganguli v PP [1956] MLJ 206 (folld)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (folld)

Caswell v Powell Duffryn Associated Collieries [1940] AC 152 (folld)

Chin Keow v Government of Malaysia & Anor [1967] 2 MLJ 45 (refd)

Elizabeth Choo v Government of Malaysia & Anor [1970] 2 MLJ 171 (folld)

Habee Bur Rahman v PP [1971] 2 MLJ 194 (folld)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Hunter v Hanley [1955] SC 200 (Scot) (folld)

Maynard v West Midlands Regional Health Authority [1985] 1 All ER 635 (refd)

Rich v Pierpont (1862) 3 F & F 35 (refd)

Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697 (distd)

Whitehouse v Jordan & Anor [1981] 1 WLR 246 (refd)

Wilsher v Essex Area Health Authority [1988] 1 All ER 871 (refd)

Yap Liang Neo v Tan Yew Ghee & Anor; In the matter of the trusts of the will of Tan Lye deceased, [1936] MLJ 113 (folld)

Appeal from: Civil Suit No 759 of 1981 (High Court, Kuala Lumpur)

PS Ranjan (*MS Dhillon* with him) (*PS Ranjan & Co*) for the appellant in the first, second and fourth appeals and the third respondent in the third appeal. A

S Kulasegaran (*Usha Kula* with him) (*Ranjit Thomas & Kula*) for the appellant in the third and fifth appeals and the third respondent in the first and second appeals.

Chacko Vadaketh (*Shearn Delamore & Co*) for the second respondent in the first, second and third appeals. B

Victoria Martin (*RK Nathan*) for the first respondent in the first, second and third appeals and the respondent in the fourth and fifth appeals.

Abdul Malek Ahmad JCA (delivering the judgment of the court): In his statement of claim filed on 23 December 1981, the plaintiff, through his father and next friend, had asked for special damages of RM46,000 with interest at 8%pa from the date of the writ of summons to the date of realization, general damages inclusive of future loss of earnings and interest thereon from the date of judgment to the date of realization, costs and further or other relief. C D

He had originally cited the President and General Secretary of the Chinese Maternity Hospital ('the hospital') as well but had subsequently withdrawn his claim against them leaving only the present three defendants. The first and second defendants were both consultants attached to the hospital at the material time. His claim against them is for damages for pain and suffering and causing blindness to his eyes due to their negligence when he was under their care. E

As for the third defendant, he had pleaded that they were vicariously liable for the negligence of the first and second defendants by virtue of being their employer since the damage for the plaintiff's pain and suffering was due or caused within the scope and during the first and second defendants' employment as consultants at the hospital. F

The plaintiff was born at 30 weeks old on 28 December 1975 at the hospital. Being premature, he was kept in an incubator and given oxygen therapy from that date to 7 January 1976 and discharged on 6 February 1976. His parents were not told of any defect in the vision of the plaintiff's eyes at the time of discharge. Subsequently in that year, the plaintiff's father and next friend had brought to the second defendant's attention as to the defect in the plaintiff's vision but the second defendant did not provide any treatment saying that it would be corrected by itself and that the plaintiff's vision would be normal. G H

The plaintiff further pleaded that after some time, it was revealed that he was blind and consultations with eye specialists indicated that he was suffering from retrolental fibroplasia ('RLF') said to have been caused by excessive oxygen administered immediately after birth and prior to discharge from the hospital, due to the failure of the first and second defendants in not controlling and monitoring the supply of oxygen into the incubator and at the same time not having the plaintiff examined by the ophthalmologist during the period of the oxygen therapy. I

A We heard five appeals together. The first appeal (W–02–459–1995) is by the second defendant against that part of the decision made on 27 January 1995 that directed him to pay general damages of RM100,000 to the plaintiff with interest and costs as prayed and that he be liable to the extent of 40% in respect of such award.

B The second appeal (W–02–398–1995) is also by the second defendant but this time against that part of the decision on 13 February 1995 which gave him a Sanderson order for the costs of the first defendant.

The third appeal (W–02–398–1995) is by the third defendant against that part of the decision ordering that they are 60% liable for the general damages awarded to the plaintiff in the sum of RM100,000 with interest C and costs.

The fourth appeal (W–02–461–1995) is by the second defendant against the decision made on 25 March 1995 dismissing with costs his application to set aside the sealed and signed order dated 13 February 1995.

D The fifth appeal (W–02–397–1995) is by the third defendant against the decision made on 25 March 1995 dismissing with costs their application to vary the sealed order dated 13 February 1995 and served on them on 23 February 1995.

Encik PS Ranjan of learned counsel for the second defendant started E his submissions by saying that the plaintiff was born 69 days too early on 28 December 1975 at 3.25pm and was placed in the incubator following birth. The first defendant had seen him some time after birth at which point the plaintiff was already receiving oxygen at ten litres per minute. Of the ten litres, five went into the incubator and five into the hood.

F When the oxygen began and who directed it is not known but the first defendant stopped the incubator oxygen leaving only the hood oxygen. She passed the management of the patient to the second defendant as she was going on leave and in effect saw the plaintiff only on that occasion.

At all material times, the plaintiff was attended to by nurses in the G employment of the hospital and although various nursing notes were produced on the agreed bundle, none of the nurses gave evidence.

The second defendant saw the plaintiff for the first time on 29 December 1975 at 9am. According to the second defendant's medical report, on that day the plaintiff was in a critical condition and was suffering from peripheral cyanosis and minimal chest recession with evidence of H respiratory distress. The plaintiff had been given antibiotics to cover the infection.

The second defendant also stated that the nurses had noted 'can afford incubator' implying that the matter of transferring the plaintiff to the University Hospital was discussed with the parents but they chose to I remain at the hospital. This was because it was expensive to keep the plaintiff in the incubator and to administer oxygen as well.

On the third day, the plaintiff suffered an intraventricular haemorrhage which was spontaneous and unavoidable. He turned blue four times that

day and in fact at 1.35pm the plaintiff stopped breathing for one minute. However, he responded to external cardiac massage and began to breathe again. Because of this, the second defendant started the incubator oxygen at the same rate while at the same time the hood oxygen was maintained. An umbilical vein drip was also set up. A

On the fourth day, the plaintiff had a tinge of jaundice but the second defendant noted that the incubator oxygen was taken off that day. On the fifth day, his jaundice was satisfactory but he suffered several outs of fits. On the sixth day, the plaintiff's condition was satisfactory and the drip was removed. Although his respiration was irregular and he had mild jaundice, he was no more suffering from fits. B

On the seventh day, his condition was satisfactory. On the eight day, the plaintiff was well and active but still had some jaundice. Oxygen into the hood was reduced to three litres per minute. On the ninth day, it was further reduced to two litres per minute. On the tenth day, it was stopped. At the same time, the incubator oxygen was restarted and maintained at two litres per minute. C D

On the 11th day, the oxygen was stopped. The plaintiff still had some jaundice and weighed for the first time at two pounds and eleven ounces. On the 21st day, having progressed well, he was taken out of the incubator. It is pertinent to observe at this juncture that the day by day report indicate that the plaintiff progressed well with the amount of oxygen administered and the result was that he survived the ordeal. E

The plaintiff was discharged on 6 February 1976 weighing five pounds and four ounces. The second defendant had asked the plaintiff's parents to bring him back in a month's time for a follow-up at the third defendant's clinic. Instead, he was brought to the second defendant's Chow Kit clinic for which the second defendant's notes were not available. The last line of the second defendant's medical report is quite significant where he states that it was his practice to advise routine ophthalmic examination for a premature baby at the follow-up stage. F

At the outset of his submissions, learned counsel for the second defendant rested his appeal on seven grounds. They were: G

(a) two conflicting judgments;

(b) no measure, preventive or curative for RLF at that time;

(c) no excessive oxygen given in the circumstances of this case;

(d) the trial judge erred on causation and the tortious act found by the trial judge did not cause injury to the plaintiff; H

(e) the trial judge erred in deciding what was the appropriate standard of care;

(f) the trial judge erred in law in assessing medical evidence; and

(g) the trial judge had decided on issues outside the pleadings. I

However, he had in the course of his submissions abandoned the third, fourth and sixth grounds.

On the two conflicting judgments, he reiterated that the trial judge had reserved judgment after a lengthy trial of 36 non-consecutive days commencing on 8 March 1993 and concluding on 26 January 1994. The last written submissions went in on 5 July 1994. On 27 January 1995, judgment was pronounced in open court. It was described as a decision ('the first judgment') and is reproduced below for effect:

> Decision
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> Having heard the evidence led by all parties and the written submissions by all learned counsel, I am satisfied that the first defendant has not been negligent in this case as the plaintiff was under her care for only a short period and that during that time she had, in the absence of sophisticated equipments, used her clinical judgment to administer adequate oxygen required by the baby. Furthermore, there is no causal link between her acts and the blindness which the plaintiff has unfortunately suffered.
>
> Similarly with the second defendant, he had also used his clinical judgment to ensure that the plaintiff received sufficient oxygen in order to save him from possible death and brain damage. However, I find him to be negligent because as a competent and responsible paediatrician, he is under a duty to alert the parents, at the time of the plaintiff's discharge of the possible onset of RLF. Had he done so, the parents could have referred the plaintiff to an ophthalmologist and RLF could have been prevented.
>
> As regards the third defendant, I am of the view that they are not vicariously liable for the negligence of the second defendant as it is clear that he was not employed by the third defendant but was merely attached to the hospital on an honorary basis. However, the third defendant having designated a Special Care Nursery are deemed to have held out to the world at large that such facilities went with the services and equipment consonant with such facilities. They are, therefore, in breach of contract as they had offered what they did not have to offer and the plaintiff had accepted the offer on the basis that the hospital had the said equipments and services. As such, I find that the third defendant is more liable than the second defendant and I assess their liabilities at 60% and 40% respectively.
>
> As to quantum, I am satisfied that special damages have not been specifically proven. Similarly with the claim for loss of future earnings. The basis is highly speculative. The only area of damages payable would be general damages for the blindness. Having regard to the circumstances of this case, to my mind, an award of RM100,000 is fair and reasonable.
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> Costs and interest as prayed.

Following the grant of leave to appeal, the trial judge issued another judgment on 15 September 1995 ('the second judgment'). Learned counsel for the second defendant emphasized that in the first judgment, the learned trial judge said sufficient oxygen was administered in order to save life and to prevent brain decay but the second defendant had failed to advise the plaintiff's parents on the possible onset of RLF, meaning that if they had been informed, RLF could have been prevented.

However, at p 11 of her second judgment, she said:

> All along, the second defendant's evidence was that the plaintiff was in a serious condition. He admitted that in 1969 he was taught that a higher

level of oxygen would cause RLF but he was not taught the safe level of oxygen to prevent RLF. I find that although there was no safe level of oxygen, there was, however, a recommended level of oxygen which the second defendant ought to have known of. A

Then, at pp 12 and 13 of the second judgment, she had stated:

However, I find that even if there was no treatment in 1975 for RLF, it was the duty of the second defendant — when he well knew that too much of oxygen was one of the causes of RLF — to have at least monitored the plaintiff's eyesight after the incubator was removed to check for any such onset or to check for any possible complications that could arise at the third stage. This is further compounded by DW2's admission under cross-examination that the said infant should have been examined for early signs of ROP from 1–6 weeks interval. He also agreed under cross-examination that in the absence of modern facilities, the next best alternative ought to be resorted to. When DW2 was cross-examined and shown an article edited by DW6 himself, he confirmed that there were two main theories regarding the pathogenesis of RLF and that in both theories oxygen was the causative factor. He also agreed that a paediatrician attached to a profit-orientated hospital would have recommended the purchase of equipment to save life and sight and that a paediatrician must keep abreast with the knowledge and recent development. He further agreed that the second defendant should have advised the third defendant that in the event of premature babies, there could be a possibility of complications and that the hospital ought to have such facilities. Furthermore, he agreed that the paediatrician was taught to spot the onset of RLF and that it was part of the duty of a paediatrician to know that a premature baby could develop RLF and to call for an ophthalmologist. B C D E

Further, at p 14 of her second judgment, she concluded:

However, there was no mention in his report that at the time of PW1's discharge, he had advised PW2 to consult an ophthalmologist. Thus, I find him to be negligent because as a competent and responsible paediatrician, he is under a duty to alert the parents of the possible onset of RLF. F

Learned counsel went on to argue that the learned trial judge did not say in her second judgment that RLF could have been prevented by such measures. In essence, he continued, there were contrary findings of fact and the second judgment cannot stand in the light of the first judgment which had resulted in important differences in both the judgments. When the court interjected to say a retrial should be ordered, learned counsel gave a prompt negative answer adding that the appellate tribunal can come to its own conclusions as the second judgment is a nullity. G H

If there are two judgments on the same point, he stressed, the second judgment must be disregarded. He had referred to *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 where this court, after an admirable analysis of several cases on the same point, ruled that supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision-making process. I

Consequently, it ruled that it is undesirable to have two written judgments in the same case. However, it added that this finding should not cause any injustice to the parties, since the appeal was by way of rehearing and the court must tackle afresh all the issues raised in the court below, including those the judge did not deal with.

In his speech, my learned brother Mahadev Shankar JCA had distinguished between the words 'judgment', 'order', 'decision' and 'decree' and had said (at p 724):

> ... In ordinary and even legal parlance, a 'judgment' is taken to mean both the intellectual process of arriving at a decision for the resolution of a dispute as well as the decision itself. Order 42 r 5 of the Rules of the High Court 1980 states that if in the case of any judgment a form thereof is prescribed in Form 79, the judgment must be in that form. If by a judgment we mean the written statement containing the facts found, the inferences made and the law applied in coming to a verdict, then 'judgment' or 'order' clearly do not mean the same thing. The term 'grounds of decision' comes into play only when notice of appeal has been filed (see O 49 r 2(3) of the Subordinate Court Rules 1980, r 18(4)(e) of the Rules of the Court of Appeal 1994 and r 57(4)(e) of the Rules of the Federal Court 1995). These rules are not similarly worded so far as the High Court is concerned. It is clear that a 'written judgment' when juxtaposed with 'grounds of decision' does not mean the same thing as the 'judgment, decree or order appealed from' which has to be separately attached under r 18(4)(e).
>
> We are unable to say from the record whether there was a separate application by the appellant for the grounds of decision, or whether these were gratuitously supplied by the judge when the notes of evidence were applied for. However, the reasons given by him for the dismissal of the application, and his decision to do so on 5 August 1994, are recorded in writing by him in his notes (24, 25) and signed.
>
> Albeit with some regret, we must find that this was therefore a written judgment not merely in the sense of an 'order' but also in the sense of an order coupled with the grounds therefor.

In the course of the judgment in that case, the case of *In the matter of the trusts of the will of Tan Lye deceased, Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 113 ('*Yap*'s case') was cited where it was held that where two conflicting judgments had been given in the same matter, the second was held to be a nullity. It had also referred to *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where the Federal Court ruled that a judge became functus officio after judgment is delivered or the order drawn up except under the slip rule.

The situation in the present appeal is quite different from that of *Sykt Bekerjasama-Sama*'s case. Here, the learned trial judge had dealt with the same issues differently in her two judgments and we were more inclined to hold, as in *Yap*'s case, that her second judgment is a nullity despite being conscious of the fact that since this is by way of rehearing, it was open to us to deal with all the issues afresh which we did but then our findings coincided with her first judgment.

We are also aware of two other authorities and although they both involved criminal procedure, the principle as regards the effect of two judgments would be the same. In *Habee Bur Rahman v PP* [1971] 2 MLJ 194, the trial judge held:

> Dealing for the moment only with judgments, I should perhaps comment on the question of supplementing the grounds of decision.
>
> Section 221 of the Sarawak Criminal Procedure Code (Cap 58) provides as follows:
>
> 'No Court, other than the High Court having once recorded its judgment, shall alter or review the same.'
>
> It is not permissible for a trial court having signed and delivered its grounds of decision to supplement the grounds of decision or to amplify them in any way.
>
> It is however not such conduct as can be said to have occasioned a miscarriage of justice or such as can be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed.
>
> The only effect of it was that the appellate court must consider the original judgment as it stood and exclude any consideration of the parts added. (See *Loh Kwang Seang v PP* [1960] MLJ 271 and *Ankur Nath Ganguli v PP* [1956] MLJ 206.)
>
> I therefore exclude from my consideration the second judgment of the learned magistrate.

In *Ankur Nath Ganguli v PP* [1956] MLJ 206, the Court of Appeal held:

> If a trial judge gives no reasons which are recorded for convicting an accused person, then and only then by sub-s (1) of s 21 of the Courts Ordinance 1948, he can on notice of appeal being given, write his grounds of decision which shall form part of the record. That subsection permits only a written judgment or grounds of decision being included in the record, and this must be either the one or the other, not both. Any addition to the oral judgment cannot form part of the record of appeal.

Based on these considerations, we came to the conclusion that only the first judgment can be considered especially since we have no inkling as to why there were two separate judgments eight months apart and because the contents of the second judgment are not exactly an elaboration of the first judgment resulting in the fact that they actually do not tally in substance. This is compounded by the fact that in between the two judgments, there is another written decision ('the decision') which is undated, except for the certification by the judge's secretary on 28 March, where the year is not stated but it must be 1995, that the copy is correct, where the trial judge had said:

> I have been saying and still maintain that the second defendant is jumping the gun by making this application to review my decision dated 27 January 1995. Had he filed his notice of appeal and waited for my grounds of judgment, we would not be wasting our time these few days. I do not propose to review my decision dated 27 January 1995 as I feel that this application is frivolous and a sheer waste of court's precious time. The second defendant being dissatisfied with my decision should have filed his notice of appeal and not go by way of this application. As to my oral

A decision which I had indicated right from the beginning is not my grounds of judgment, a copy was supplied to the counsel for the third defendant when Mr Manmohan approached my secretary several times and informed her that he wanted a copy as he had missed out some of the words that I uttered in open court. On that ground, I thought, it was not improper to supply a copy to an officer of the court. I would like to stress here that this B is just my decision which I shall justify in my grounds of judgment later.

As to the application to set aside the sealed copy, I am satisfied that the learned deputy registrar had followed the proper procedure. On the question of interest, she had consulted me first before she approved the draft.

Lastly, on the application for stay of execution, I am of the opinion that C no special circumstances have been shown by the applicants.

For the above reasons, I dismiss all the applications with costs.

This appears to be some form of explanation by the trial judge that her first judgment was not the 'grounds of judgment' but only a 'decision'. We were of the considered view that if it was, all the trial judge needed to say D for her 'decision' on 27 January 1995 was:

> Claim against first defendant dismissed with costs. Judgment as prayed against second defendant on 40% liability and against the third defendant on 60% liability for RM100,000 general damages with costs and interest. No award for the claim for special damages.

E As she had gone into some detail, going into five paragraphs running over three pages, we cannot hold that the reasons set out in the first judgment do not amount to a judgment. In any case, the first judgment, just like the subsequent decision, appears in the notes of evidence as part of the record. In her decision on 25 March 1995, she had specifically stated that the first judgment was only an oral decision which she would 'justify' in her F subsequent grounds of judgment, namely her second judgment. This she did, but her subsequent elaboration is in direct contrast to her findings in her earlier decision.

If we consider only the first judgment, there is no question of negligence on anybody's part as regards the administration and the quantity G of oxygen whether into the incubator or into the hood. The only negligent act of the second defendant, in our view, was his failure to inform the parents of the plaintiff at the time of discharge of the possibility of the loss of vision. This is despite the submissions of learned counsel for the plaintiff that the first judgment only stated that the oxygen was adequate only to save life and to prevent brain damage but no mention had been H made as to whether it was a safe level to avoid the impairment of vision. We found this submission completely devoid of merit as the trial judge had categorically stated that the second defendant was only negligent in not alerting the plaintiff's parents at the time of discharge of the possible outset of RLF. In this respect, the second defendant had categorically I stated in his report that it was his practice to advise routine ophthalmic examination for premature babies at the follow-up stage and upon a balance of probabilities, we do not think the second defendant had not done so in the present case.

That brings us to the next point. The question is whether if the second defendant had advised the plaintiff's parents of the possible onset of RLF, it would have made any difference since there was no treatment, preventive or curative, available at the material time.

This is because all the medical witnesses had testified that in 1976, there were no measures to be taken for prevention or treatment of RLF. Even if the parents had been alerted, learned counsel had continued, there was nothing the parents could have done as the blindness would have set in anyway.

In the special report published in 1992 titled 'Screening for Retinopathy of Prematurity (ROP)' by Alistair R Fielder and Malcom I Levene at p 860, it is stated:

> The demise of retinopathy of prematurity (ROP) was confidently forecast in the 1950s when supplemental oxygen was identified as a causal factor. Unfortunately, this did not transpire and by the mid-1960s it became all too apparent that ROP was not solely of historical interest. The purpose of this article is to consider screening for ROP working on the basis that at present this condition is not entirely preventable, and that despite meticulous neonatal care, serious and blinding disease still occurs. As in the past, the ophthalmologist could neither prevent nor treat ROP, effectively all responsibilities for this condition, including its medicolegal aspects, rested with issues related to causation.

At p 864, the same report says:

> Screening for ROP
>
> The ophthalmologists' rule in screening has always been less than satisfactory. In the 1960s, it was suggested ROP might be prevented by the ophthalmoscopic monitoring of retinal vessel calibre, but was soon found not to be feasible. Furthermore, it soon became apparent that serious ROP occurred despite the most meticulous neonatal care. As ROP could be neither prevented nor effectively treated, screening was not a high priority. This all changed in 1988 when the Multicenter Trial of Cryotherapy for Reginopathy of Prematurity reported that the unfavourable outcome in severe ROP can be significantly reduced. Screening is now an important clinical issue and has been the subject of a number of publications.

From an international journal on ophthalmology called 'Eye', its 1992 Vol 6 Pt 2 report has this to say:

> Cryosurgery was first reported to induce regression of acute ROP by Yamashita in 1972. Since then, many conflicting reports regarding its efficacy have been published but recently the authoritative American collaborative Cryo-ROP study group has established both improved anatomical and functional outcomes from appropriately timed treatment. In the Cryo-ROP study, eyes with advanced stage 3 disease affecting eight cumulative or five contiguous clock hours in the presence of 'plus' features of posteriors vascular congestion were said to have 'threshold' disease and without treatment were predicted to have a 50% chance of progression to total retinal detachment or traction detachment involving the macula (referred to as 'an unfavourable anatomical outcome, corresponding to stages 5 and 4b in the International Classifications) and were randomized into treatment

A and non-treatment groups. Forty-three per cent of such eyes progressed to an unfavourable outcome at three months without treatment, and a significantly lower 21.8% with treatment. This represents a treatment failure rate, in purely anatomical terms, of about one eye in five. When the functional results were reported, a higher proportion of treated eyes had a poor outcome. This largely reflects the poor performance of eyes with
B traction detachments not involving the macular (stage 4a) in which macular ectopia may be severe. Although much progress has been made, we are still far from achieving our objectives of preventing blindness and the milder forms of visual disability in the very prematurely born infant.

To achieve this goal, consideration must be given to case selection, the appropriateness of treating one eye or both eyes, method of treatment,
C timing of treatment, probe design and the extent of ablation required to induce regression of acute stage 3 ROP.

These points are considered using our experience of cryotherapy over an eight year period in single unit.

In a special article entitled 'A Re-examination of the Role of Oxygen in
D Retrolental Fibroplasia' by Jerold F Lucey and Barbara Dangman appearing in the magazine Pediatrics Vol 73 No 1, in January 1984, the problem has been summarized as follows:

A critical review of the literature of retrolental fibroplasia indicates that the cause of this disease is not yet known.

E Oxygen is certainly a critical factor but it is still not possible to make precise recommendations as to the amount or the duration of therapy that is safe. We have over emphasized the role of oxygen in the past, and as a result of this, the false impression has been created that RLF is a disease that can be prevented. This gross oversimplification of a complex disease with multiple causes has resulted in many unjustified malpractice claims.

F A study of the present epidemic indicates that excessive oxygen administration probably plays a minor role, in contrast to the first epidemic in which prolonged oxygen administration was clearly a major factor.

A reasonable working hypothesis is that the developing retina is highly sensitive to any disturbance in its oxygen supply, either hyperoxemic or
G hypoxemic. The retinal circulation is subject to the same wide fluctuations as the cerebral circulation in newborn infants. The very low-birth-weight, sich premature infant suffers from a number of conditions, many of which can seriously disturb the retinal circulation, resulting in hypoperfusion and ischemia. These factors (immaturity, hyperoxia, hypoxia, blood transfusions, intraventricular hemorrhage, apnea, infection, hypercarbia, hypocarbia,
H patent ductus arteriosus, prostagladin synthetase inhibitors, vitamin E deficiency, lactic acidosis, prenatal complications, genetic factors) may all be present in an infant. They may interact to produce various degrees of retinal damage. Nearly all of these factors cannot be prevented or controlled by our present methods of care.

Unfortunately, this means that RLF is an extremely difficult disease to
I prevent, treat, or investigate. A disease of this complexity with multiple causes will require very large numbers of infants in any controlled study of a therapy. Retrolental fibroplasia should be considered an avoidable latrogenic disease in very low-birth-weight infants. Its cause in these infants is not known.

The issue is whether there was in existence at the material time any measure, preventive or curative for the onset of RLF. On the facts, learned counsel had argued, the trial judge should have ruled that advising the plaintiff's parents was of no benefit since no treatment was available then. A

The medical witnesses called had testified to the fact of the non-availability of such preventive or curative treatment. The statement of claim did not allege that there was such a duty to advise the parents or the breach of it. B

It is appropriate to reproduce para 12 of the statement of claim at this point:

> The blindness of the plaintiff was caused solely by the negligence of the first and second defendants and the third defendants and/or their servants or agents jointly or individually. C
>
> Particulars of negligence of first and second and third defendants jointly or individually:
>
> (a) Providing excess oxygen than was necessary; D
>
> (b) Failure to control the quantity of oxygen into the incubator;
>
> (c) Failure to monitor the quantity of oxygen entering into the incubator;
>
> (d) Failure to check and examine the plaintiff's condition with respect to the eyes of the plaintiff;
>
> (e) Failure by the first and second defendants to have the eyes of the plaintiff's examined by an opthomologist during the period the plaintiff was given oxygen therapy; E
>
> (f) Failure on the part of the second defendant to render treatment or take some form of measure to arrest further deterioration to the eyes of the plaintiff after his attention is drawn to the defect by the plaintiff's father; F
>
> (g) Failure on the part of the first defendant to examine and detect any defect in the plaintiff's eyes whilst under his care; and
>
> (h) At the time of discharge, the first defendant failed to inform the plaintiff's parents about the said defect.

Paragraph (h), in particular, puts the duty on the first defendant only. Even if the second defendant had been included in para (h) and he had failed to alert the parents at the time of discharge, nothing could be done and the giving of advice would not have prevented the blindness which had set in anyway at that point of time as there is no evidence when the RLF occurred. G

The evidence of the consultant ophthalmologist (PW4) is of considerable importance. He was then attached to the University Hospital and was only one of four in Kuala Lumpur at that time. H

In answer to the question as to whether because there was no clearly effective therapy before 1988 and ophthalmic screening was not a high priority, he had said that it was difficult to say one way or the other. He added that only an ophthalmologist can identify the stages of RLF and event though treatment was not available, he would be able to pick them up. However, he said that there was no purpose for an early ophthalmic examination considering that there was no treatment for RLF at that time. I

When asked what is the safe level of oxygen to be given, he replied that this answer is best given by someone who works with premature children. When told that the plaintiff suffered from several bouts of breathing difficulties and intraventricular haemorrhage, was born 69 days before the estimated date of delivery and weighed two pounds eleven ounces on the 11th day, he said that if the plaintiff's father had asked him what the cause of RLF was today, he would have said that it was a multifactorial ethicology in view of the oxygen administered, the respiratory problems, the intraventricular haemorrhage and the premature birth.

As to whether oxygen was a causative factor, he replied that because of present information available it is, but it is not sufficient to cause RLF. He added that there had been cases of full term babies who had never received oxygen but had developed RLF.

The second defendant's third witness was the consultant paediatrician who headed the Paediatrics Department in the General Hospital Kuala Lumpur at the beginning of 1975. During that period, he said the treatment for a premature baby was to keep them warm in an incubator, provide him with nourishment fluids, observe his respiration, pulse rate and colour and to use suction to clear the airway. In a premature baby who is blue and who is having respiratory problems, oxygen would be given to help the baby breathe better and to improve the colour. The amount of oxygen is a clinical judgment. If the baby receives too little oxygen, it will be fatal. He was aware at that time of the danger of oxygen but was also aware that it was not the main cause of RLF.

The next ground raised by learned counsel for the second defendant was that the trial commenced in 1993 and many things, including medical knowledge and practice, had changed dramatically. The literature relied on by the plaintiff was not contemporary and even if it was, it did not set the standard of practice in a smallish hospital in Kuala Lumpur. He added the standards varied even in the same city.

Learned counsel for the first respondent, the plaintiff in the court below, opened her submissions by stating that the first judgment was entitled 'decision' whereas the second judgment had the heading 'grounds of judgment'. As to the first judgment, she argued that the trial judge had never put it into writing or signed it or to make it part of a written decision. It was merely an oral decision. We fell there is an oversight here on the part of learned counsel as the first judgment or decision had in fact been signed, and actually forms part of the record.

Learned counsel continued by saying that what the trial judge meant in her first decision was that enough oxygen had been given to save life and to prevent brain damage. But that did not mean that too much oxygen was not given that resulted in loss of sight and this point was left open and dealt with at length in the second judgment.

She added that the safe level of oxygen was 40% but whether five or ten litres of oxygen amounted to 40% was never canvassed or established. To manifest itself, the onset of RLF took four to six weeks. The 11 days of oxygen and the 21 days in the incubator were well within the four

weeks. In the early stages, the RLF could be treated and if the parents had been told of this factor, it would have made a big difference to the parents. The failure to alert is negligence as found by the trial judge and she contended that there was sufficient evidence to support this finding. A

Learned counsel for the third defendant maintained that the second judgment was a nullity and should not be considered at all, citing *Sykt Bekerjasama-Sama*'s case as guidance. Otherwise, he said, the law is at large and the litigants will be in a quandary. This was because, he added, the courts are designed to decide and not to create doubts. As such, the second judgment was defective and should be disregarded. B

In the first judgment, he continued, the trial judge had negated oxygen as the cause. There was also a fundamental flaw in the reasoning as the judge had based her finding on contract not in tort. Having absolved oxygen and blaming the second defendant for the failure to alert, there is no vicarious liability on the part of the third defendant as there is no question of services or equipment being wanting. These were not pleaded as grounds of complaint. In any event, he said, an infant cannot enter into a contract. C D

Learned counsel had continued by saying that there was no iota of evidence as regards lack of services in the hospital. In fact, the plaintiff owed his life to the nurses and the medical staff who showed a high degree of care. Since the evidence and pleadings were lacking, the liability of the third defendant could not be supported. E

On these considerations, we were bound by the case authorities in dealing with the question of the availability of the preventive and curative treatment of RLF as the situation was in late 1975 and early 1976 and not when the trial concluded on 26 January 1994 and the decision made on 27 January 1995, or when we decided on this appeal on 1 April 1997. At that point of time, the medical literature referred and the evidence of the medical witnesses who testified clearly indicate that no such treatment was available and we find that even if the second defendant had alerted the plaintiff's parents at the time of the plaintiff's discharge, which we hold he did as stated in his report, it would have come to nothing. F G

In *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, the facts were that the infant plaintiff was born prematurely suffering from various illness including oxygen deficiency. While in a special baby unit at the hospital where he was born, a catheter was twice inserted into a vein of the plaintiff rather than an artery and on both occasions that plaintiff was given excess oxygen. The plaintiff was later discovered to be suffering from an incurable condition of the retina resulting in near blindness. The plaintiff's retinal condition could have been caused by excess oxygen but it also occurred in premature babies who were not given oxygen but who suffered from five other conditions common in premature babies and all of which had afflicted the plaintiff. The plaintiff brought an actions against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. At the trial, the medical evidence was inconclusive whether the excess had caused or materially contributed to the plaintiff's retinal condition. H I

A It was held that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead, the burden remained on the plaintiff to prove the causative B link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any one of a number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him, the plaintiff had not discharged the burden of proof as to causation.

C McNair J in his speech in the celebrated case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 had said at p 121:

> Before I turn to that, I must explain what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the D circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case, it is generally said that you judge that by the action of the man in the street. He is the ordinary man. In one E case, it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing F to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence G means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.

H At p 122, he had said:

> ... A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a I practice, merely because there is a body of opinion that takes a contrary view ... . Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August 1954, not in February 1957; and in one of the well-known cases on this topic, it has been said you must not look through 1957 spectacles at what happened in 1954.

The test propounded in *Bolam*'s case had been followed in a number of decisions including *Chin Keow v Government of Malaysia &Anor* [1967] 2 MLJ 45 and *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171.

In *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635, the House of Lords ruled that it had to be recognized that differences of opinion and practice existed in the medical profession and that there was seldom any one answer exclusive of all others to problems of professional judgment and therefore although the court might prefer one body of opinion to the other, that was not a basis for a conclusion that there had been negligence on the part of the defendant doctor.

In *Hunter v Hanley* [1955] SC 200 (SCOT), it was held that to establish liability by a doctor where deviation from normal practice is alleged, three facts required to be established. First of all, it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted that practice; and thirdly, and this is of crucial importance, it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

At pp 204 and 205 of the same case, it is reported that to succeed in an action based on negligence, whether against a doctor or against anyone else, it is of course necessary to establish a breach of that duty to take care which the law requires, and the degree of want of care which constitutes negligence must vary with the circumstances — *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152, per Lord Wright at pp 175–176. But where the conduct of a doctor, or indeed of any professional man, is concerned, the circumstances are not so precise and clear cut as in the normal case. In the realm of diagnosis and treatment, there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of.

In *Rich v Pierpont* (1862) 3 F & F 35, the view was that a medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result.

Lord Fraser of Tullybelton said in *Whitehouse v Jordan & Anor* [1981] 1 WLR 246 at p 263 that merely to describe something as an error

of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.

In *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171, Raja Azlan Shah J (as he then was) took the view, having referred to *Bolam*'s case, *Hunter*'s case and *Rich*'s case, that the principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced. He also said that the point had been argued on a number of occasions and the authorities on the point which were cited by counsel laid down propositions which are familiar to the court and that is that the standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients.

Much as we sympathized with the plaintiff for his total loss of sight, on these considerations, we could only conclude that the claim against the second and third defendants must fail. We, therefore, made the following orders:

(a) first appeal:
- (i) appeal allowed;
- (ii) order of learned judge on 27 January 1995 set aside;
- (iii) judgment for second defendant in this appeal;
- (iv) no order as to costs here and below;
- (v) deposit refunded to the appellant; and
- (vi) cross appeal dismissed with no order as to costs.

(b) second appeal:
- (i) in view of decision in the first appeal, appeal allowed and order of costs set aside;
- (ii) no order as to costs here and below;
- (iii) deposit refunded to the appellant;
- (iv) order in favour of the first defendant as to costs set aside; and
- (v) cross appeal dismissed with no order as to costs.

(c) third appeal:
- (i) appeal allowed;
- (ii) order dated 27 January 1995 set aside;
- (iii) judgment for the third defendant;
- (iv) no order as to costs here and below;

(v) deposit refunded to the appellant; and
(vi) cross appeal dismissed with no order as to costs.

(d) fourth appeal:
(i) appeal allowed in view of our decision in the first appeal;
(ii) no order as to costs here and below; and
(iii) deposit refunded to the appellant.

(e) fifth appeal:
(i) appeal allowed in view of our decision in the first appeal;
(ii) no order as to costs here and below; and
(iii) deposit refunded to the appellant.

Appeals allowed.

Reported by Jafisah Jaafar